Supreme Court, U.S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

79-947

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 77-2963

BETTY CALHOUN, et al., Petitioner

v.

UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COHN AND PACELLI
Meredith Financial Center
Center Bldg., Suite 408
17822 Seventeenth Street
Tustin, California 92680

By: _____
MYRON S. COHN
Attorney for Petitioner

[_____]
DALE A. CASTLE

A member of the above-named court, having been duly admitted to the Supreme Court of the United States on October 16, 1978.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO. 77-2963

BETTY CALHOUN, et al., Petitioner
v.
UNITED STATES OF AMERICA, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COHN AND PACELLI
Meredith Financial Center
Center Bldg., Suite 408
17822 Seventeenth Street
Tustin, California 92680

By: _____
MYRON S. COHN
Attorney for Petitioner

[_____]
DALE A. CASTLE

A member of the above-named court, having been duly admitted to the Supreme Court of the United States on October 16, 1978.

INDEX

	Page
CITATION TO THE OPINIONS BELOW.....	1
JURISDICTION.....	2
QUESTIONS PRESENTED.....	2
STATEMENT.....	3
REASONS FOR GRANTING THE WRIT.....	5
CONCLUSION	6
APPENDIX -A- OPINIONS BELOW.....	

CITATIONS

IN RE GRIMLEY 137 U.S. 147 (1890).....	5
U.S. v. RUSSO 23 U.S.M.C.A. 511 (1975).....	6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO. 77-2963

BETTY CALHOUN, et al., Petitioner
v.
UNITED STATES OF AMERICA, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 18, 1979.

CITATIONS TO THE OPINION BELOW

The opinion of Judge William B. Enright granting the defendant's motion for summary judgment appears in Appendix A, and is unreported. The opinion of the

Circuit Court of Appeals is unreported and appears in Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Although plaintiffs filed their action under the Federal Torts Claim Act, the lower courts based their decisions on the court created "Feres Doctrine."

QUESTIONS PRESENTED

1. Whether plaintiffs-appellants' deceased son legally acquired the status of a serviceman so as to allow the Feres Doctrine to bar any recovery against the United States of America. The trial court found a change of status.

2. Whether a fraudulent enlistment of a mentally incompetent person changes the legal status of the mentally incompetent person to that of a service-man, so as to apply the Feres Doctrine to

bar any recovery against the United States of America. The trial court found a change of status.

3. Whether an enlistment contract between the United States and a mentally incompetent person is void or merely voidable.

STATEMENT

This is a lawsuit by the heirs and next friend of Lynn E. McClure, deceased, who died as a direct result of a pugil stick bout at the Marine Corps Recruit Depot, in San Diego, California, on December 6, 1975.

The plaintiffs sought recovery against the United States and individual officers and employees of the United States pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §§1346 (b), 2671-2680, and for constitutional violations of the decedent's civil rights.

Plaintiffs alleged that the decedent was mentally incompetent at the time of his enlistment contract, and further, that the Marine Corps recruiters fraudulently recruited the decedent with

knowledge of his disability and overall lack of qualification to enlist.

The plaintiffs submitted affidavits in opposition to the government's motion for summary judgment, based on the Feres Doctrine, showing that the decedent had failed the 10th grade and dropped out of school, had been incarcerated in Rusk State Mental Hospital, had six misdemeanor convictions within two years, four of which involved alcohol abuse, and a statement that decedent was retarded. In addition, affidavits of a judge in Texas who had handled the decedent's sentencing was submitted, along with the affidavit of the Chief of Police of Lufkin, Texas, setting forth the fact that no one from the Marine Corps had contacted his office concerning the criminal record of the decedent.

Notwithstanding the conflicting affidavits submitted concerning the factual and legal status of the decedent, the trial court ruled that a valid enlistment contract had been entered into and the decedent's status as a serviceman barred plaintiffs' recovery under the "Feres Doctrine."

REASONS FOR GRANTING THE WRIT

1.) The decision of the lower court patently ignored the overwhelming evidence that fraudulent enlistments were taking place on a regular and continuous basis during the period of decedent's enlistment and that a fraudulent enlistment is contrary to sound public policy and a violation of law.

2.) The decision of the lower court failed to resolve the factual question of decedent's legal status at the time of his injury. This court's decision in In Re Grimley 137 U.S. 147 (1890) clearly established that enlistment in the armed services is governed by principles of contract law, and that, under certain circumstances, a contract entered into with a mentally incompetent person is void. This decision has been followed consistently by the highest military courts, who have always required a factual investigation of the acts and circumstances surrounding a recruit's enlistment before they make a decision that the military authorities have jurisdiction over the person of an alleged

recruit. U.S. v. Russo 23 U.S.M.C.A. 511 (1975).

3.) The decision of the lower court that the enlistment contract is merely voidable is contrary to the specific holdings of the highest military courts that a fraudulent enlistment creates a contract that is void ab initio. This court should render a decision that will harmonize the patent conflict between civilian and military bodies of jurisprudence.

4.) Sound public policy requires that a fraudulent enlistment have no force or effect, and the government should be held to answer for the fraudulent acts of its employees as a means of insuring that the government itself will more closely supervise and regulate the conduct of its employees to prevent this conduct from occurring again in the future.

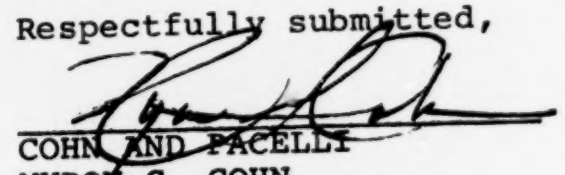
CONCLUSION

This court should grant the petition for certiorari and hear the issues raised

in this important area of civil rights.

DATED: December 13, 1979.

Respectfully submitted,



COHN AND PACELLI
MYRON G. COHN
Attorney for Petitioner

COHN AND PACELLI
Meredith Financial Center
Center Bldg., Suite 408
17822 Seventeenth Street
Tustin, California 92680

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 18 1979
EMIL E MELFI, JR CLERK
U.S. COURT OF APPEALS

BETTY CALHOUN, et al., Plaintiff,	)	NO. 77-2963
vs.	)	OPINION
UNITED STATES OF AMERICA, et al., Defendants.	)	

Appeal from the United States
District Court
of the Southern District of California

Before: BROWNING and TANG, Circuit Judges, and MUECKE,* District Judge.

PER CURIAM:

The judgment below is affirmed. Judge Enright's opinion, reported at ___F. Supp. ___, is adopted as the opinion of this court.

*Honorable C.A. Muecke, United States District Judge of the District of Arizona, sitting by designation.

X FILED
X ENTERED
LODGED
RECEIVED
MAY 26 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY /S/ J. HATCH DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BETTY CALHOUN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil No. 70-0937-E JUDGMENT

For the reasons set forth in the Memorandum Decision and Order dated May 26, 1977, and for good cause shown, it is hereby adjudged that the motion to dismiss is granted as to all defendants.

DATED: May 26, 1977.

/s/
WILLIAM B. ENRIGHT,
Judge
United States District
Court

Copies to:
Plaintiffs
Defendants

X FILED
X ENTERED
LODGED
RECEIVED
MAY 26 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY /S/ J. HATCH DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BETTY CALHOUN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil No. 76-0937-E MEMORANDUM DECISION AND ORDER

This case presents an important application of a court-made exception to the Federal Tort Claims Act for injuries arising incident to military service. Plaintiffs, the survivors of a Marine Corps recruit, have brought this action for wrongful death against the United States and individuals in decedent's chain of command. Defendants have filed a motion to dismiss, or in the alternative, for summary judgment. Upon duly considering the oral argument of

counsel on May 16, 1977, and all the memoranda, affidavits and exhibits submitted in support thereof, this court does hereby grant defendants' motion to dismiss this action.

I

Before attending to the merits of this motion, a brief statement of facts of this case is necessary to put this court's decision in its proper perspective.

The decedent, Lynn E. McClure, first applied for enlistment into the United States Marine Corps in Lufkin, Texas on September 24, 1975. His vocational aptitude (ASVAB) test score in the seventh percentile caused a rejection of his application. On November 12, 1975 decedent reapplied in Austin, Texas and received a passing score in the fifty-ninth percentile. In his second application decedent made false statements that he had not previously applied to enlist in the Corps, that he had never been confined in a mental institution, and that he had never been arrested for or convicted of an offense.

Upon the false application, decedent was accepted into the Corps. He signed an enlistment contract for a four-year term on November 14, 1975 and arrived at the Marine Corps Recruit Depot in San Diego the following day. Twice within the next three weeks decedent went on unauthorized leave and was confined to correctional custody for a period of seven days. After his release, on December 6, 1976, decedent was assigned to the "motivation platoon." It is not disputed that on this date decedent was compelled to engage in several pugil stick training bouts at the direction of the supervising officer. During one of these bouts decedent fell unconscious. He was transported to the Naval Hospital in San Diego and later transferred to the Veterans Administration Hospital in Houston, where he died on March 13, 1976.

Plaintiffs filed administrative claims with the Department of the Navy on April 3, 1976, which were denied by lapse of six months.[1/] The complaint in this action was filed October 6, 1976,

1/ 28 U.S.C. § 2675(a).

alleging wrongful death under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq, and deprivation of constitutional rights contained in Article I, Section 8 and the Fourth, Fifth, Eighth and Thirteenth Amendments under 28 U.S.C. § 1331. Plaintiffs allege that the enlistment contract entered by decedent was voidable by reason of his incompetency, and further that the recruitment of decedent and his death were caused by violations of the Marine Corps' own regulations.

II

A motion to dismiss an action for failure to state a claim or for want of subject matter jurisdiction may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Sherman v. Yakahi, 549 F.2d 1287 (9th Circuit 1977). It is apparent that defendants' motion to dismiss is founded upon both lack of subject matter jurisdiction and failure to state a claim for which relief can be granted. Federal Rule of Civil

Procedure 12(b)(1) and (6). The above-quoted standard is often cited in Rule 12(b)(6) motions, but is equally applicable in motions challenging subject matter jurisdiction when such jurisdiction may be contingent upon factual matters in dispute.

Initially, defendants move to dismiss the cause of action for wrongful death under the Federal Tort Claims Act upon the ground that the court-made exception to the Act pronounced in Feres v. United States, 340 U.S. 135 (1950) bars such a claim. The Court held that the United States is not liable under the Act "for injuries to active duty servicemen where the injuries arise out of or are in the course of activity incident to service." Supra, at 146. The rationales for this limitation on liability include the maintenance of discipline in the relationship between the serviceman and his or her superiors, the orderly conduct of military affairs by eliminating the duty to defend lawsuits, and the uniform system of compensation for injuries to servicemen

established by Congress.[2/] Supra, at 141, 144; Henninger v. United States, 473 F.2d 814, 815-816 (9th Cir. 1973). The Court

2/ The Feres decision outlined the uniform compensation system then available to injured servicemen. Supra, at 144, n.12. Congress has subsequently enacted a uniform system of death benefits for survivors of servicemen who die while on active duty. 10 U.S.C. § 1475 et seq. Such compensation includes the payment of a death gratuity (§§ 1475-1480) and expenses incident to death (§ 1482). Although the benefits provided by Congress do not approach the amounts prayed for in the instant complaint, the disparity is not persuasive to a court considering an action to which the Feres Doctrine is potentially applicable. Judge Chambers stated in Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965):

> The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff-appellant is a remedy he likes better.

In the years since Feres, the courts have often commented upon the harsh results generated by application of the doctrine. However, despite invitations to correct this interpretation of the Federal Tort Claims Act in Feres, supra at 138, and in later decisions, e.g., United States v. Lee, 400 F.2d 558 (1968), cert. denied, 393 U.S. 1053 (1969), no amendments have been enacted. The passage of twenty-seven years since the Feres decision leaves

of Appeals for the Ninth Circuit in Henninger, supra, has strictly applied the Feres doctrine by holding that it "absolutely bars Federal Tort Claims actions by servicemen." (emphasis added).

Plaintiffs contend that two factors existing in the instant case should preclude an application of the Feres bar. First, they contend that decedent's alleged mental incompetency at the time of execution of the enlistment contract creates a voidable obligation. They argue that this voidability eliminates not only the duty of service but other constraints, such as the Feres limitation on tort liability. Second, they contend that a violation of Marine Corps regulations[3/] either precludes application of the Feres Doctrine or creates a due process violation for which plaintiffs should be afforded recovery.

2/(cont.) little doubt as to congressional intent in this area.

3/ Plaintiffs cite no specific regulations that were violated. However, they generally contend that Marine Corps regulations pertaining to the recruitment, detention and training of decedent were infringed.

For several reasons the court is not persuaded that mental incompetency at the time of execution of an enlistment contract, if proven, would create an exception to the Feres Doctrine. First, the factual determination of competency creates precisely the type of operation which the Ninth Circuit in Henninger, supra, sought to avoid. There, plaintiff adjured the court to make a determination on the effect his suit would have on military discipline. That court declined to make any factual determinations which would limit its "absolutist reading of Feres" because "nearly every case would have to be litigated and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs." Henninger, supra at 815-16.

Second, while the court is conscious of the trend of the law to apply modern contract principles to military enlistment contracts, Novak v. Rumsfeld, 423 F. Supp. 971, 972 (N.D. Cal. 1976), the power to avoid a contract must accrue equally to all parties. This court would

not formulate a rule of voidability for an enlistee's misrepresentations that would operate to deprive that serviceman of statutory medical or death benefits for injuries suffered incident to military service. For example, if decedent had not died but had suffered a permanent disability, this court would not authorize a withholding of medical benefits on the ground that the enlistment contract was voidable as a result of decedent's enlistment misrepresentations.[4/]

Third, the court finds that case law would not support avoidance of the Feres rule by assertion of incompetency to contract for military service. In Southard v. United States, 397 F. Supp. 409 (E.D. Pa. 1975), aff'd 535 F.2d 1247 (3rd Cir. 1976), plaintiff unsuccessfully attempted to avoid the Feres rule by contending that malpractice in his

4/ This court does not hold that an enlistment contract is never voidable. It merely holds that military benefits cannot be obtained or withheld by claiming voidability after the occurrence of an injury for which those benefits are sought.

preinduction physical created a void and illegal induction. Also germane to plaintiffs' contention of incompetency is the case of Henninger, supra. There, the court found that the United States was not estopped from invoking the Feres Doctrine because it made misrepresentations which indirectly caused that plaintiff's injury. That court held that no representations by Government agents could waive the immunity granted by the Feres Doctrine. Plaintiffs here contend that Government agents were remiss in failing to detect decedent's incompetency prior to induction. It is clear that neither malpractice, misrepresentation, nor omission by a Government agent affect the bar to suit established by Feres.[5/]

5/ This court need not decide whether plaintiffs are estopped from asserting incompetency. It was argued by defendants that the misrepresentations of decedent prevented discovery of his incompetency. See United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). The court's resolution above makes determination of this issue unnecessary.

Similarly, alleged violation of Marine Corps regulations cannot affect this impediment to recovery. The conduct of an officer, albeit in violation of Marine Corps regulations, does not waive the Government's immunity. Henninger, supra. In McCord v. United States, 377 F. Supp. 953 (M.D. Tenn. 1972), aff'd 477 F.2d 599 (6th Cir. 1973), the court rejected an argument that a violation of regulations would preclude the application of Feres.

> The result is not changed by the fact that Sgt. Klay was negligent in the conduct of cleaning his weapon, or even that it was a needless act which was unauthorized at this particular station. The crucial element is that the accident resulted from activities engaged in by active duty personnel in the course of military duty. (emphasis supplied).

Supra, at 954.

Thus, the United States may not be sued for injuries incurred incident to military service. Once this immunity is

established it is certain that the individual defendants are also immune from suit. It is clearly the law in this circuit that one soldier may not sue another for injuries suffered attendant to military service. Bailey, supra; Mattos v. United States, 412 F.2d 793 (9th Cir. 1969). This rule must certainly apply to all individual defendants who were joined merely because they were superiors in decedent's chain of command.

III

Plaintiffs additionally seek recovery for alleged infringement of constitutional rights. The court finds that the theory of constitutional deprivation is essentially a restatement of the cause of action in tort. In a similar case presenting a dual theoretical basis, Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971) aff'd 455 F.2d 992 (2d Cir. 1972), decedent's survivors sought recovery for the death of decedent in Vietnam under the Federal Tort Claims Act and for alleged violation of constitutional rights. Citing the broad Ninth Circuit holding in

United States v. Lee, 400 F.2d 558 (1968), cert. denied, 393 U.S. 1053 (1969), that court held that the action was barred under the Feres rule because "it is the status of the claimant as a serviceman rather than the legal theory of his claim which governs in such cases." Rotko, supra, at 47.

Moreover, there is some authority to limit recovery for alleged constitutional deprivations when the claim is customarily recognized under existing bodies of state tort law or the Federal Tort Claims Act, which incorporates state tort law.[6/] In Paul v. Davis, ___U.S. ___, 96 S. Ct. 1155 (1976), plaintiff brought an action in federal court under the Fourteenth Amendment and civil rights statutes to redress an allegedly libelous statement by a local police officer. The Court found that the Fourteenth Amendment's Due Process Clause should not be extended

6/ Whether the United States is liable under the Act depends upon whether a private individual under similar circumstances would be liable under state law. United States v. Muniz, 374 U.S. 150 (1963)

and superimposed upon pre-existing systems of state tort law. The decision is germane to the instant case. Absent the deprivation of a recognized constitutional right, it would subvert the application of the Federal Tort Claims Act and its defined exceptions to allow a litigant to superimpose over that body of law extensions of constitutional rights which were never intended to apply in this context.

This court does not hold that a constitutional provision will never override the Act or doctrines adopted thereunder. Indeed, the Constitution remains the "supreme Law of the Land." Article VI. The court holds only that the instant case presents issues to be resolved under the Federal Tort Claims Act and does not raise any recognized constitutional deprivation.[7/]

7/ For example, despite decedent's status as an enlistee, it is clear that even conscripted service does not violate the Thirteenth Amendment. United States v. Gidmark, 440 F.2d 773 (9th Cir.), cert. denied 404 U.S. 868 (1971). Historically, the prohibition against "cruel and unusual punishments" under the Eighth Amendment has been

Accordingly, the court does hereby find that the motion to dismiss is granted as to all defendants. Judgment shall be entered accordingly.

DATED: May 26, 1977.

/s/ William B. Enright
WILLIAM B. ENRIGHT,
Judge
United States District
Court

Copies to:
Plaintiffs
Defendants

7/(cont.) limited to criminal punishment. Ingraham v. Wright, ___U.S.___, 45 L.W. 4364 (April 19, 1977). There is no support for the proposition that recovery may be obtained against those other than law enforcement officers for violation of the Fourth Amendment. See, 28 U.S.C. § 2680(h); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Nor is there support for extending the rule of Bivens, supra, to Fifth Amendment due process violations. Archuleta v. Callaway, 385 F. Supp. 384, 388 (D. Colo. 1974). No comment need be made upon plaintiffs' allegation of Article I violations.

SINCE 1952

THE BRIEF SHOP

10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604

LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING

(213) 877-8620 763-2965

Produced By Copy-Print Method

Supreme Court, U. S.
FILED
JAN 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-947

In the Supreme Court of the United States

OCTOBER TERM, 1979

BETTY CALHOUN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-947

BETTY CALHOUN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The judgment of the United States Court of Appeals for the Ninth Circuit in this civil case was entered on September 18, 1979. Petitioners did not seek rehearing in the court of appeals, nor did they request or obtain an extension of time for filing a petition for a writ of certiorari. The petition was filed on December 18, 1979, and is therefore out of time. The time limits established by 28 U.S.C. 2101(c) are jurisdictional. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JANUARY 1980